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VIA HAND DELIVERY

Ms. Magalie R. Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554


Re: **Danville and Nonesuch, Kentucky**
MM Docket No. 01-169; RM-10145

Dear Ms. Salas:

Transmitted herewith for filing with the Commission on behalf of L.M. Communications, Inc. ("LM"), are an original and four copies of an Opposition to the Motion For Leave to File Supplemental Reply Comments filed on October 31, 2001 by Clear Channel Broadcasting Licenses, Inc. Pursuant to a request filed November 7, 2001, LM, by its attorneys, requested a brief extension of time until November 16, 2001 to file the attached Opposition. Accordingly, this Opposition is timely filed.

In the event that there are any questions concerning this matter, please contact the undersigned.

Very truly yours,


Sally A. Buckman

SAB/gfe
Enclosure

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)	
)	
Amendment of Section 73.202)	MM Docket No. 01-169
Of the Commission's Rules)	
Table of Allotments,)	RM-10145
For FM Broadcast Stations.)	
(Danville and Nonesuch, KY))	
)	

To: Chief, Allocations Branch

OPPOSITION TO MOTION FOR LEAVE TO FILE
SUPPLEMENTAL REPLY COMMENTS

L.M. Communications, Inc. ("LM"), by its attorneys, hereby respectfully opposes the *Motion for Leave to File Supplemental Reply Comments* in the above-referenced proceeding filed by Clear Channel Broadcasting Licenses, Inc. ("Clear Channel") on October 31, 2001. Because Clear Channel has not provided any additional pertinent information in response to LM's *Reply Comments* and its *Motion for Leave to File Supplemental Reply Comments* was filed four weeks after the comment period in this matter ended, the Commission should deny Clear Channel's *Motion for Leave to File Supplemental Reply Comments*. In the event the Commission reviews the substance of Clear Channel's *Supplemental Reply Comments*, the agency should take into account that Clear Channel has misconstrued applicable precedent and not provided sufficient information to demonstrate that Nonesuch is a community for allotment purposes.

I. Clear Channel Has Not Provided Any Basis to Support Acceptance of Its Supplemental Reply Comments.

As the Commission has made abundantly clear on numerous occasions, the “Commission’s Rules do not contemplate the filing of pleadings beyond the comment periods set forth in [a Notice of Proposed Rulemaking]” and when the additional comments “do not provide information of decisional significance [they] therefore will not be considered.”¹ Clear Channel’s *Supplemental Reply Comments* provide no new information. They merely reiterate what Clear Channel previously stated in its petition, comments, and reply comments. Because Clear Channel’s *Supplemental Reply Comments* do no more than restate its previous arguments, the Commission should exclude them from consideration on this basis alone.

In its motion, Clear Channel speciously suggests that the Commission should accept Clear Channel’s *Supplemental Reply Comments* because LM did not file its *Reply Comments* until October 2, 2001²—the Reply Comment due date the Notice of Proposed Rulemaking (“*Notice*”) in this proceeding established. This contention is without merit. In the *Notice*, the Allocations Branch stated: “While Nonesuch can be located on some maps, staff research failed to locate any information supporting community status for Nonesuch. *Therefore, Clear Channel is requested to provide evidence supporting its assertion that Nonesuch qualifies as a community for allotment purposes.*”³ In its *Comments*, Clear Channel responded to this directive and filed information that it

¹ *Rosendale, New York*, Report and Order, 10 FCC Rcd 11471, 11471 n.4 (rel. Oct. 20, 1995).

² Clear Channel Motion for Leave to File Supplemental Reply Comments at 2.

³ Notice of Proposed Rulemaking (“*Notice*”) at para. 3 (emphasis added). The Commission also observed that “[a]lthough Clear Channel indicated there are some businesses in Nonesuch, it has not identified those entities with addresses or shown that they are intended to serve residents of Nonesuch as opposed to other areas. Clear Channel should show that the organizations, civic groups, churches, schools, police, etc. have a nexus with Nonesuch.” *Id.* at n.1.

contended demonstrated that Nonesuch qualified as a community for allotment purposes. Upon reviewing Clear Channel's showing and undertaking an independent investigation, LM disagreed with Clear Channel's contentions. Accordingly, LM properly filed timely *Reply Comments* responding to the evidence Clear Channel submitted and demonstrating why, in LM's opinion, the evidence Clear Channel submitted was insufficient to demonstrate community status. Now, more than four weeks after the close of the comment period in this proceeding, Clear Channel improperly claims that it should be able to respond to LM's timely and properly filed *Reply Comments*.

II. Clear Channel Has Not Demonstrated That Nonesuch, Kentucky Is a Community for Allotment Purposes.

Neither Clear Channel's *Comments*, *Reply Comments*, nor its *Supplemental Reply Comments*, which, as noted, merely reiterate claims made in Clear Channel's earlier filings, demonstrate that Nonesuch is a community for allotment purposes. Clear Channel does not show a nexus between those businesses that cite their location as Nonesuch and the locality. Clear Channel provided no information about the one business that Clear Channel identifies as potentially serving Nonesuch residents—the “Nunsuch Grocery.”⁴ It provides no yellow page listing, picture, or other publicity relating to this business. Indeed, the Woodford County Chamber of Commerce does not list the store among the County's grocery stores. *See Exhibit A*. In addition, the chimney sweep that Clear Channel references⁵ is actually located 40 minutes away in Lexington, Kentucky. *See Exhibit B*.

In its *Supplemental Reply Comments*, Clear Channel contends that the Allocations Branch should not credit those statements of area residents submitted by LM who reside

⁴ Clear Channel Supplemental Reply Comments at 3.

⁵ *Id.* at 8.

“two or more miles from the relevant intersection” that constitutes Nonesuch.⁶ This claim is most significant for the acknowledgement by Clear Channel that Nonesuch is really nothing more than an intersection in an essentially rural area. In any case, there is no precedent to suggest that there is any specific geographic limitation on where residents who have direct knowledge about a potential community must reside, nor are there any objectively recognized boundaries to the area Clear Channel claims is the community of Nonesuch. In any event, under the method Clear Channel proposes, the Commission should also exclude 4 of the 12 “Declarations” that Clear Channel submitted to the Commission with its *Comments* to substantiate the view that the residents of Nonesuch view it as a community.⁷

In addition, Clear Channel substantially misconstrues the precedent on which it relies to support its argument that Nonesuch is a community for allotment purposes. Clear Channel relies on *Semora, North Carolina* to support its claim that no locality must show all of the indicia for community status recognized by the Commission to qualify for its own radio station.⁸ LM has never disputed this statement. *Semora*, however, does not stand for the proposition that demonstrating only one or two of the indicia the Commission considers is sufficient to demonstrate community status, but rather that the Commission considers the characteristics of each community too unique to summarize

⁶ *Id.* at 7 n.17.

⁷ Clear Channel Comments at Exhibit 12. Two “residents”—Patricia Adams and Larry Woodson live 2 to 4 miles from the “relevant intersection.” One additional “resident”, Mary Paul, did not give an address, and another, Minnie Bannister, signed an affidavit for LM stating that Nonesuch was not a community and that she had only lived in the area for 1 year rather than 50. See *Exhibit 12* to Clear Channel Comments and *Exhibit E* to LM Reply Comments.

⁸ *Id.* at 5.

the requisite criteria in a simple checklist, and prefers to evaluate each locality on a case-by-case basis.⁹

Clear Channel fails to mention that in concluding that *Semora* was a community for allotment purposes, the Commission relied on the facts that, in addition to various businesses, *Semora* -- unlike *Nonesuch* -- also had two local churches, a civic organization, a post office, and a volunteer fire department. In *Semora*, the Commission also emphasized that “*Semora* is not a small municipality on the fringe of a larger urban area. In many of the cases in which the Commission has determined that a municipality is not a community for allotment purposes, the finding was directly related to the proximity of that municipality to a larger metropolitan area.”¹⁰ By contrast, *Nonesuch* is on the outskirts of *Versailles*, a larger metropolitan area on which the residents of *Nonesuch* rely for municipal services, job opportunities, schools, religious organizations, social and civic organizations, and household requirements. See *Exhibit E* to LM Reply Comments.¹¹

Clear Channel also misconstrues the holdings in *Kanarraville, Utah*¹² and *Broadview, Montana*,¹³ cases that LM cited in its *Reply Comments*. Clear Channel contends that the only reason that the Commission did not consider *Kanarraville* and

⁹ *Semora, North Carolina*, 5 FCC Rcd 934 (rel. Feb. 20, 1990).

¹⁰ *Id.* at para. 5.

¹¹ Clear Channel’s claim that LM has a local radio monopoly based on its ownership of two stations licensed to communities in Woodford County is highly ironic. Clear Channel owns seven stations that provide service to Lexington, Kentucky—the 106th Arbitron market—located only 22 miles from the *Nonesuch* intersection. Clear Channel’s stations garnered almost 40 percent of the market revenues for 2000. *BIA 2001 Radio Market Report*. Clear Channel also owns 3 of the 4 stations in Frankfort, Kentucky, which is only approximately 30 miles from Lexington. LM, in contrast, owns five stations that serve Lexington (two of which are licensed to communities in Woodford County). These stations (together with Station WXLO for which LM sells advertising time pursuant to a joint sales agreement) garnered approximately 14 percent of the market revenue for 2000. *Id.* Further, it is highly likely that the reason Clear Channel is seeking to change the community of license of Station WHIR-FM to *Nonesuch* is to enable Clear Channel ultimately to move the Station closer to Lexington.

¹² *Kanarraville, Utah*, Report and Order, 14 FCC Rcd 15962 (rel. Sept. 24, 1999).

¹³ *Broadview, Montana*, Report and Order, 14 FCC Rcd 14101 (rel. Sept. 3, 1999).

Broadview as communities for allotment purposes is because the respective petitioners had failed to provide names of any businesses with Kanarraville or Broadview in their names.¹⁴ However, in the *Kanarraville* decision, the absence of business names containing “Kanarraville” played a minor role in the Commission’s evaluation. Far more important was the petitioner’s failure to demonstrate that the businesses and churches in Kanarraville served Kanarraville as opposed to other areas. Clear Channel’s filings woefully fail in this regard as well. The only indicia of community status that Clear Channel cites is a smattering of businesses located near the intersection that, according to Clear Channel, constitutes the community of Nonesuch. These businesses primarily serve Woodford County tourists, not local residents, and Clear Channel has not presented any evidence to the contrary.

In addition, the complete text of the passage on which Clear Channel relies sheds far more light on the factors that are important to the Commission’s evaluation of a particular locality:

[Petitioner] has not provided the names or addresses of any social or civic organizations, schools, libraries or other governmental services which are located within Kanarraville. To support community status, [petitioner] could have provided the names of any businesses which contain ‘Kanarraville’ in their names, excerpts from a telephone book showing Kanarraville’s separate telephone exchange, a list of industries, specific names and addresses of churches in Kanarraville, affidavits from residents of Kanarraville, name and address of the mayor, council members, evidence that rural residents view Kanarraville as a center for shopping and medical services, name and address of schools, parks, civic associations, or any additional information to support community status.¹⁵

¹⁴ Clear Channel Supplemental Reply Comments at 7-8.

¹⁵ *Kanarraville, Utah*, Report and Order, 14 FCC Rcd 15962, 15963 (rel. Sept. 24, 1999). Clear Channel similarly distorts *Broadview, Montana*, in which the Commission listed the same litany of acceptable

Like the petitioner in *Kanarraville*, Clear Channel has failed to produce the majority of the information that precluded Kanarraville—an incorporated locality with a post office, mayor, town council, and several churches—from gaining community status for allotment purposes.

Clear Channel’s discussion of the Commission’s decision in *Gaviota, California*¹⁶ is also misleading. Clear Channel states that “[i]n *Gaviota* the allocations branch sought to use mailing addresses as a nexus between an area’s businesses and the named community in the absence of any other objective or subjective nexus evidence,” and claims this is not “the best way” of determining a nexus between businesses and the community.¹⁷ Clear Channel’s opinion as to the validity of using mailing addresses does not change the fact that this is a factor on which the Allocations Branch has relied in several cases. Clear Channel also ignores the fact that, in denying community status to *Gaviota*, the Allocations Branch explained that the petitioner had not shown “other indicia of community status in *Gaviota* such as a city hall, local government, municipal services, library, newspaper, financial institutions or civic organizations such as a Lions Club or Rotary, or civic organizations such as a Chamber of Commerce.”¹⁸ Clear Channel has failed to provide evidence of any of these indicia as well.

III. Conclusion

Clear Channel’s *Supplemental Reply Comments* are improperly filed, untimely, and provide no relevant new information. For the reasons set forth herein, LM

evidence that it cited in *Kanarraville, Utah* and noted that the Petitioner had failed to supply a sufficient amount of such evidence. 14 FCC Rcd 14101, 14102 (rel. Sept. 3, 1999)

¹⁶ 16 FCC Rcd 1518 (rel. Dec. 22, 2000).

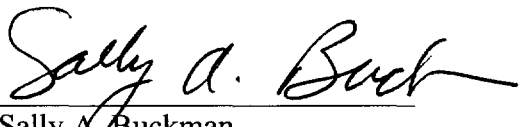
¹⁷ Clear Channel Supplemental Reply Comments at 8.

¹⁸ 16 FCC Rcd at 1523.

respectfully requests that the *Motion for Leave to File Supplemental Reply Comments* be denied and the Commission conclude that Channel 296A should not be reallocated from Danville, Kentucky, to Nonesuch, Kentucky.

Respectfully submitted,

L.M. COMMUNICATIONS, INC.

By: 
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(Admitted Illinois only)

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Its Attorneys

November 16, 2001



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873-2265

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873-2581

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Versailles, KY 40383
873-1355

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Midway, KY 40347
846-4732

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Versailles, KY 40383
873-7722

Kelly's
447C Lexington Rd.
Versailles, KY 40383
879-8850

Kessler's 1891 Eatery
197 South Main St.
Versailles, KY 40383
879-3344

Little Caesars Pizza
93 Crossfield Dr.
Versailles, KY 40383
873-1000

McDonald's
100 United Dr., Ste. 4C
Versailles, KY 40383
873-2394

Subway Sandwich Shop
458 Lexington Rd.
Versailles, KY 40383
873-1040

Sunrise Bakery & Cafe
97 Crossfield Dr.
Versailles, KY 40383
873-1210

Sweet Potatoes, Inc.
520 Versailles Center
Versailles, KY 40383
879-1718

Tacos Too
Lexington St.
Versailles, KY 40383
873-9311

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Versailles, KY 40383
873-8115

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Dairy Mart #175

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Huff's Grocery

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873-7722

Kroger

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Versailles, KY 40383
873-7704

Moore's Meats

Crossfield Drive
Versailles, KY 40383
873-7004

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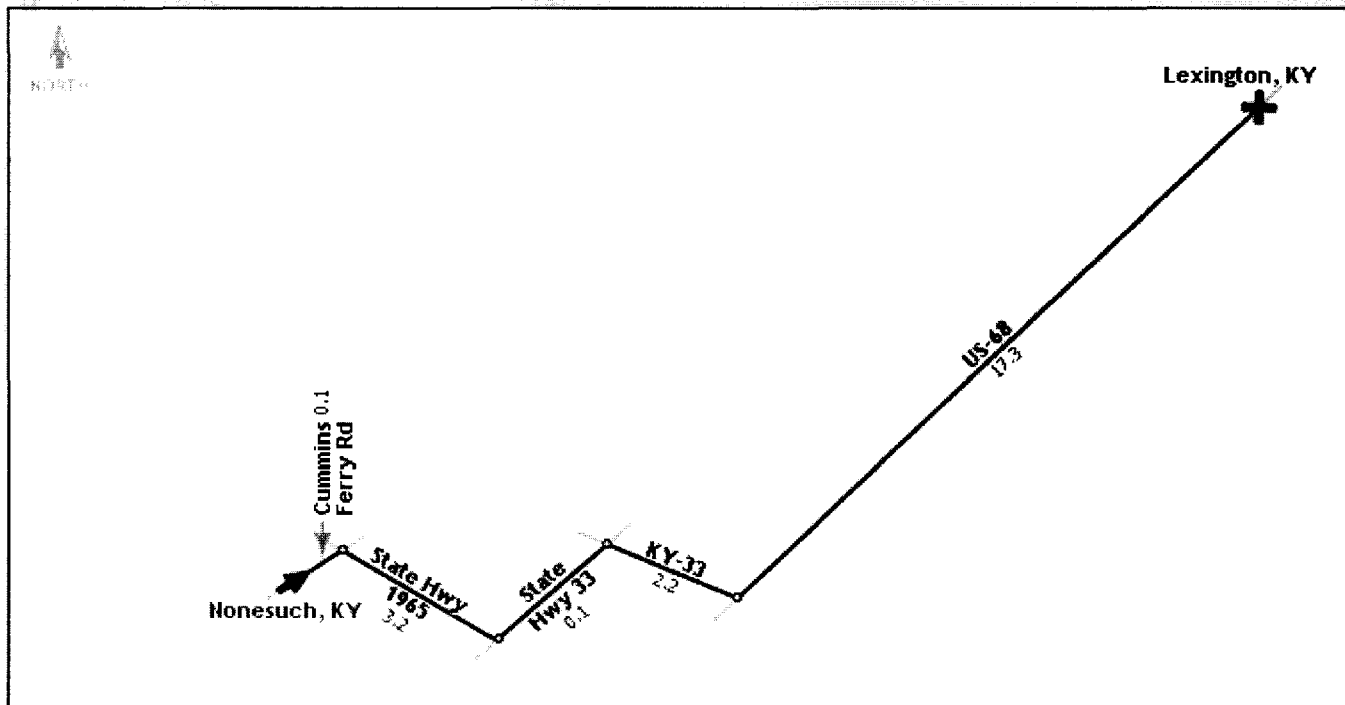
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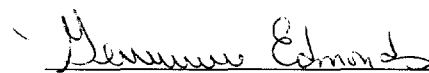
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